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THE TRUTH IN LENDING ACT: A CASE FOR EXPANDING ASSIGNEE LIABILITY

Summer Krause*

I. MARIA SANCHEZ'S STORY

Life was good for Maria Sanchez.¹ It was true that since immigrating to the United States from Mexico, things had been tough. Raising two children as a single mom and battling the language barrier had not been easy. But things were turning around. Although she had to work long hours at her job at Taco Bell, she had managed to save a lump sum of money. It was time for her to make her first large purchase, her very own car! She went to a car dealer in Watsonville, a small, primarily agricultural town in California, where she knew the dealer spoke Spanish and would be able to help her. All she knew about shopping for a car was that she wanted a mini-van to transport her kids. Maria did not understand the concept of mileage or "blue book value" and bought a six-year-old Toyota mini-van with 140,000 miles for \$18,000 on credit. Because the transaction had no finance fee² and zero percent APR,³ she thought she had made a good deal.

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1. This hypothetical is based on an interview the author conducted at a consumer legal advice clinic at the Watsonville Law Center. In 2007, a class action lawsuit alleging Truth in Lending Act violations was filed against the dealer. Because of the Truth in Lending Act's limited assignee liability provision, the law center could not include the finance company in the lawsuit.

2. The finance charge is a broad definition that includes any discernible cost of credit. RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶ 3.01, at 107 (Robert A. Cook et al. eds., 2000).

3. Annual percentage rate ("APR") is a measure of the cost of credit over

Three months later, Maria was rear-ended while driving her car. As a result of the accident, she could not work and therefore could not continue to make the car payments. Moreover, she was unable to drive the mini-van. Deciding that the cost to fix the car was more than its value, the insurance company sent Maria \$9000 reflecting the total blue book value of the car at the time of purchase. Unsure of how she would continue to pay off the other \$9000, Maria went to a local law center to ask for help.

After investigation, the law center advised Maria that the car dealer's failure to disclose how the cost of financing affected her total purchase price was a Truth in Lending Act violation. The original blue book value of her car was \$9000, and thus if she had purchased the vehicle with cash, the price likely would have been the same. By charging Maria \$18,000 because she bought the car on credit, rather than \$9000 if she had paid in cash, the dealer hid the finance charge and failed to disclose to Maria the cost she paid to purchase on credit. Maria lamented that had she known that she was paying as much in interest as for the car itself, she would have shopped for a better deal. Maria also learned that the day she bought the car, a finance company purchased her \$18,000 account for only \$9000. This finance company routinely bought credit contracts from this dealer and knew that the dealer always failed to disclose the cost of the finance charge to its customers.

The law center filed a lawsuit on Maria's behalf alleging a Truth in Lending Act ("TILA") violation. Unfortunately, the dealer was insolvent, and it was not possible to recover her damages from him. Maria asked if she could recover damages from the finance company since it had continued to collect from her the full \$18,000. The law center, however, informed her that the finance company, as an assignee,⁴ was not liable under the current assignee liability provisions in TILA. Maria did not understand how the finance company could not

time expressed as a standardized, yearly rate. *Id.* ¶ 4.02, at 179.

4. An assignee is one who has been transferred a right that an assignor has against an obligor. E. ALLAN FARNSWORTH, *CONTRACTS* § 11.1, at 680 (4th ed. 2004). In the consumer context, where a retailer or dealer has sold an item on credit to a consumer, the retailer may assign the right to payment to a financial institution. *Id.* This financial institution collects the money from the consumer and is the assignee. *Id.* at 680–81.

be liable because not only did it know that the dealer failed to disclose the cost of financing to her, but it also profited by continuing to collect payments from her. In the end, TILA left Maria Sanchez without a remedy, while the finance company profited from the dealer's TILA violation.

Congress enacted the Truth in Lending Act in 1968 with the goal of compelling lenders to "tell the real story about the cost of credit."⁵ However, over forty years later, as Maria Sanchez's story demonstrates, lenders continue to hide the "real story" from consumers. Although TILA's uniform disclosure requirements created a greater awareness among consumers about the cost of credit,⁶ "Truth in Lending has failed almost entirely in promoting price informed borrowing decisions among the most vulnerable debtors. In the high-cost credit market, structural and market forces act, not to promote price competition, but to promote confusion and strategic lending behavior."⁷ Lenders who sell credit at a high price to people like Maria Sanchez who have poor or no credit have a greater incentive to obstruct informed price shopping.⁸

Due to this incentive, TILA's goal of compelling lenders to disclose the true cost of financing remains important today. Broad assignee liability would help attain TILA's purpose—forcing creditors to tell the real story about the cost of credit—because it would ensure that the consumer credit market polices itself. The effectiveness of broad assignee provisions is illustrated by the Federal Trade Commission's Holder Rule (the "Holder Rule"), which expanded assignee liability for consumer credit transactions,⁹ and the Home Ownership and Equity Protection Act, which expanded assignee liability for a narrow class of mortgage loans.¹⁰ Yet under TILA's current provisions, assignees are only liable for

5. Elwin Griffith, *Searching for the Truth in Lending: Identifying Some Problems in the Truth in Lending Act and Regulation Z*, 52 BAYLOR L. REV. 265, 266 (2000).

6. Elwin Griffith, *The Truth and Nothing but the Truth: Confronting the Challenge in the Truth in Lending Act and Regulation Z*, 40 HOUS. L. REV. 345, 346 (2003).

7. Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 890 (2003).

8. *Id.*

9. See *infra* Part II.C.

10. See *infra* Part II.E.2.

violations apparent on the face of the disclosure statement,¹¹ and the statute limits the definition of "creditors" to parties to whom the obligation is initially payable.¹² These provisions allow assignees to escape liability even if they play an integral role in the creation of disclosure statements and have actual or constructive knowledge of TILA violations.¹³ Expanding assignee liability where the assignee has actual or constructive knowledge of the violation would promote TILA's purpose by creating greater compliance with TILA's disclosure requirements.

Not only does limited assignee liability conflict with TILA's purpose, it also frustrates consumer expectation. Most finance agreements subject to TILA contain the Federal Trade Commission's Holder Notice (the "Holder Notice").¹⁴ This notice is a provision in the finance agreement that states that all of a consumer's claims against the original creditor are also valid against the assignee.¹⁵ This statement to the consumer creates the expectation of assignee liability where there are violations by the original creditor. However, because TILA does not allow assignee liability for all TILA violations of an original creditor, courts find that TILA abrogates the statement of assignee liability in the Holder Notice.¹⁶ Yet the addition of a warning adjacent to the Notice, stating that the assignee may not be liable for some TILA violations, would comport with consumer expectation. Assignees should not be able to escape liability for any TILA violation without such a warning.

This comment begins by outlining the previous state of finance disclosure standards that necessitated Congress's enactment of TILA and by describing the goals that Congress hoped TILA would accomplish.¹⁷ Next, this comment gives a general overview of TILA's assignee liability provision and disclosure requirements after the Simplification Act.¹⁸ This section also outlines assignee liability in the context of the Holder Rule and the Home Ownership and Equity Protection

11. See *infra* Part II.E.1.

12. See *infra* Part II.D.3.

13. See *infra* Part IV.B.1.

14. See *infra* Part II.C.

15. See *infra* Part II.C.

16. See *infra* Part IV.C.1.

17. See *infra* Part II.A-B.

18. See *infra* Part II.D-E.

Act ("HOEPA"), and discuss the policy for expanding assignee liability in these contexts.¹⁹ Finally, this section delineates two common TILA violations—the hidden finance charge and the spurious open-end characterization—where creditor liability is apparent.²⁰ This comment also highlights that for these same violations, courts have difficulty imposing assignee liability where (1) the assignee is involved in creating the TILA violation yet cannot be classified as an "original creditor," (2) the assignee has knowledge of the violation, and (3) the Holder Notice is included in the contract.²¹

Ultimately, this comment proposes amending TILA to create assignee liability for all TILA violations unless the assignee proves that it did not have actual or constructive knowledge of the violation.²² However, even where an assignee lacks knowledge and the contract contained the Holder Notice, this comment proposes that courts should find that the assignee cannot escape liability unless the assignee included a warning to consumers in the contract adjacent to the Holder Notice.²³

II. BACKGROUND

A. *Pre-TILA: The Problem of Term Inconsistency in the Credit Market*

Prior to the enactment of TILA, no common terminology existed for describing the terms of consumer credit transactions.²⁴ After World War II and the explosion of consumer credit use, the varying terms that lenders used to describe credit transactions became increasingly problematic.²⁵ The terms that described the amount and rate of finance charges had the least uniformity.²⁶ As a result of this discontinuity, consumers did not understand the cost of

19. See *infra* Parts II.C, II.E.2.

20. See *infra* Part II.F.

21. See *infra* Part IV.

22. See *infra* Part V.

23. See *infra* Part V.B.

24. Peterson, *supra* note 7, at 875–76.

25. *Id.* at 876; see also *Ford Motor Co. v. FTC*, 120 F.2d 175, 180 (6th Cir. 1941) (illustrating the various non-uniform ways of stating interest rates).

26. NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT IN THE U.S. 169 (1972).

credit, leading some to assume obligations they could not meet and others unable to seek the best credit pricing.²⁷ State regulation of consumer credit created more confusion by using many incompatible terms.²⁸

Besides state regulation, federal agencies also attempted to deal with the problem of credit term inconsistency. For example, the Federal Trade Commission (the "FTC") required Ford Motor Company to cease and desist from using the term "six percent" in its advertising in connection with the cost of a deferred payment plan for the purchase of its cars.²⁹ The FTC found that the use of the term in advertisements caused consumers to purchase Ford cars under the mistaken belief that the credit charge was six percent.³⁰ The reality was that if a simple annual interest rate was applied, the interest was eleven and a half percent.³¹ The court upheld the cease and desist order, holding that the advertisement had "the tendency to mislead."³² However, this type of remedy was inadequate, as it only applied when a creditor voluntarily advertised the interest rate and was subject to the then limited jurisdiction of the FTC.³³ It was in this setting, where term inconsistency in the consumer credit market was rampant, and state and federal agency regulations were inadequate, that Congress enacted TILA.³⁴

B. The Enactment and Purpose of TILA

The consumer credit industry raised an array of concerns after the introduction of the first draft of the Truth in Lending legislation in 1960.³⁵ Congress debated the Truth in

27. *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 363 (1973); Peterson, *supra* note 7, at 876.

28. Peterson, *supra* note 7, at 876.

29. *Ford Motor Co.*, 120 F.2d at 177.

30. *Id.* at 180.

31. *Id.*

32. *Id.*

33. JOHN A. SPANOGLE ET AL., CONSUMER LAW: CASES & MATERIALS 135 (3d ed. 2007).

34. See Peterson, *supra* note 7, at 876.

35. *Id.* at 877. These considerations mostly involved what charges should be included in the term "interest" and how to calculate the appropriate rate. SPANOGLE ET AL., *supra* note 33, at 135. Some of the questions raised by the credit industry included whether a standardized rate computation should be used, whether the finance charge should be measured by creditor yield or consumer cost, how to project accurate finance charges in open-end credit transactions, whether the same rules apply to home mortgages, which

Lending Act for the next eight years and finally concluded that due to the complexity and breadth of the statute, a disclosure law that provided the necessary degree of specificity could never be drafted.³⁶ As a result, Congress drafted a statute that was relatively clear for typical credit transactions, but gave the Federal Reserve Board (the “Board”) the power to issue regulations to clarify remaining problems.³⁷ Hence, TILA was enacted in 1968, and the Board issued Regulation Z (“Reg. Z”) in 1969, which is a complete statement of the compliance responsibilities imposed by TILA.³⁸ The Board continues to update Reg. Z—to modify, expand, and refine the obligations imposed by TILA—and to issue a staff commentary to further explain ambiguities.³⁹

When enacting TILA, Congress acknowledged how important consumer credit had become to the American way of life.⁴⁰ Because borrowing eases the burden of making large purchases by allowing consumers to make payments over time, consumers rely heavily on credit.⁴¹ Accordingly, Congress declared that consumers have the right to know and should know the cost of credit in order to make educated choices.⁴² Congress decided that the “only solution is to require by legislation” a uniform disclosure method for finance charges.⁴³

The purpose of TILA was to “assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.”⁴⁴ Furthermore, Congress found that “economic stabilization would be

transactions were sufficiently “non-consumer” to justify their exclusion from coverage, and the necessary items of credit information other than the finance charge necessary to sufficiently inform consumer decision making. ROHNER & MILLER, *supra* note 2, ¶ 1.02, at 11.

36. SPANOGLIE ET AL., *supra* note 33, at 135. The statute applies to virtually every form of consumer credit transaction, including home mortgages, small loans, credit card plans, and even pawn transactions. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. H.R. REP. No. 90-1040, pt. 3, at 3 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1964.

41. *Id.*

42. *Id.* at 1965.

43. *Id.* at 1970.

44. Truth in Lending Act § 102(a), 15 U.S.C. § 1601(a) (2006).

enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers."⁴⁵

Many mandatory disclosure laws are based on the idea that if consumers are given full and accurate information regarding the transactions into which they enter, the marketplace will function more efficiently.⁴⁶ Requiring disclosures allows consumers to make informed decisions for themselves from among competing products and suppliers.⁴⁷ This results in less need for substantive regulation of consumer transactions.⁴⁸ Because TILA employs market mechanisms rather than price ceilings,⁴⁹ which economists oppose, it has become "the cornerstone of consumer credit regulation."⁵⁰

C. *The FTC Holder Rule*

Apart from TILA, there are other mechanisms that regulate the consumer credit market. In 1975, the FTC promulgated the Holder Rule with the goal of protecting consumers from a traditional contract doctrine that insulated many assignees of consumer credit transactions to the detriment of consumers.⁵¹ Many consumer credit

45. *Id.*

46. SPANOGLE ET AL., *supra* note 33, at 124.

47. *Id.*

48. *Id.*

49. Price ceilings regulate the interest rate directly, imposing a substantive limitation. DEE PRIDGEN, CONSUMER CREDIT AND THE LAW § 1.1, at 4 (Thompson/West 2006) (1990).

50. *Id.* ("The price ceiling concept has come under attack by economists as an unwarranted interference with the price mechanism in the market for consumer credit. Truth in Lending has the advantage of simply giving the consumer the relevant information, and then letting the market itself yield competitive credit prices through the process of individual consumers striving to achieve the best buy in credit."); *see also* Peterson, *supra* note 7, at 881 ("In retrospect, Congress'[s] adoption of TILA was only possible because the price disclosure approach has distinct political and theoretical advantages over other consumer credit policy options. In theory, disclosure simultaneously provides consumer protection and promotes market outcomes consistent with the conditions classical economics prescribes for efficient market economies. This characteristic makes the disclosure approach unusually attractive in the American political climate.").

51. SPANOGLE ET AL., *supra* note 33, at 584–85.

transactions that are subject to TILA are also subject to the Holder Rule.⁵² When a transaction is subject to TILA as well as the Holder Rule, questions arise as to how these two mechanisms of consumer credit regulation interact with each other.⁵³

A long-standing commercial doctrine under traditional contract law protects the "holder in due course."⁵⁴ If an assignee is classified as a holder in due course,⁵⁵ the assignee is subject only to a limited list of "real defenses"⁵⁶ and takes the assignment free of personal claims and defenses,⁵⁷ including many of the most important defenses for consumers.⁵⁸ Essentially, the holder in due course doctrine "is a collection of legal traditions and rules and commercial practices which merge into a single result: the insulation of financiers from consumer claims."⁵⁹

The application of the holder in due course doctrine became a focus of criticism.⁶⁰ Critics noted that it was becoming increasingly difficult to justify why the doctrine "requires that a hard-pressed wage-earner who has been bilked by a now-insolvent seller into buying junk . . . must pay the full price to a bank or finance company whose own relationship with the fraudulent seller has been intimate, long-continued, and profitable."⁶¹ Therefore, the Holder Rule

52. ROHNER & MILLER, *supra* note 2, at 859.

53. *See id.*

54. SPANOGLE ET AL., *supra* note 33, at 584.

55. To be classified as a holder in due course, an assignee must be (1) a holder (2) of a negotiable instrument who took it (3) for value (4) in good faith and (5) without notice of certain problems with the instrument. JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 14-2, at 509 (5th ed. 2000).

56. So-called "real defenses" are limited to (1) infancy; (2) duress, lack of legal capacity, or illegality of the transaction; (3) fraud that induced the obligor to sign the instrument without knowing its terms and without reasonable opportunity to find them out; and (4) discharge of the obligor through insolvency. *Id.* § 14-10, at 542.

57. Personal defenses include "failure or lack of consideration, breach of warranty, unconscionability, and garden variety fraud." *Id.* at 543. These personal defenses are more applicable for consumer protection than are the real defenses. *See* Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2233 (2007).

58. Peterson, *supra* note 57, at 2231.

59. Ralph J. Rohner, *Holder in Due Course in Consumer Transactions: Requiem, Revival, or Reformation?*, 60 CORNELL L. REV. 503, 567 (1975).

60. SPANOGLE ET AL., *supra* note 33, at 584.

61. Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63

required that all financiers of consumer goods or services include a legend, the Holder Notice, in their contracts stating that all of the consumer's claims and defenses are preserved against the assignee.⁶² This legend states that any assignee of the original lender takes the contract subject to all claims and defenses that the consumer might have asserted against the original lender.⁶³ The legend includes a damage cap that limits the assignee's liability to no more than the amount the borrower has paid under the assigned obligation.⁶⁴ In loans governed by the Holder Rule, the original lender commits an unfair or deceptive trade practice if its contract fails to include the Holder Notice.⁶⁵

In its Statement of Basis and Purpose, the FTC articulated an economically-oriented rationale for adopting the Holder Rule, stating that its primary focus was the distribution or allocation of costs occasioned by seller misconduct.⁶⁶ The concern was that a system that divorced a consumer's obligation to pay from the seller's obligation to perform completely allocated the cost to the consumer.⁶⁷ The FTC found that consumers are not in a position to evaluate whether seller misconduct exists in a particular transaction.⁶⁸ Without assignee liability, the cost of seller misconduct is not

YALE L.J. 1057, 1098 (1954). Many of these critics were consumer representatives. WHITE & SUMMERS, *supra* note 55, § 14-9, at 533 ("Those representatives correctly argued that the consumer was often left holding the bag, when, for example [the consumer] received shoddy house siding and signed a . . . retail installment contract The note or contract could quickly be transferred to a legitimate lender who would then insist upon full payment. Since the lender would be a holder in due course . . . the consumer could not raise the legitimate defenses she might have, and would have to pay notwithstanding her failure to receive what she bargained for. In such a case her recourse against the house-sider, who had since moved on to a new town was not satisfactory. Either she could not find the house-sider, or the house-sider would be insolvent.").

62. Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.2 (2009). Because the legend gives notice of the preservation of defenses, the legend itself is referred to as the Holder Notice, while the inclusion requirement is called the Holder Rule.

63. *Id.*

64. *Id.*

65. *Id.*

66. Preservation of Consumers' Claims and Defenses, Statement of Basis and Purpose, 40 Fed. Reg. 53,506, 53,522 (Nov. 18, 1975).

67. *Id.*

68. *Id.*

transferred back to the seller.⁶⁹ Thus, this cost is “externalized in a way that renders many sales finance transactions inherently deceptive and misleading.”⁷⁰

The FTC contemplated that by internalizing seller misconduct costs, the Holder Rule would more accurately reflect the societal costs of a credit transaction.⁷¹ The FTC found that “[a]s a practical matter, the creditor is always in a better position than the buyer to return seller misconduct costs to sellers, the guilty party. This is the real location desired, a return of costs to the party who generates them.”⁷² There are four reasons why this is so.⁷³ The first is that the creditor “engages in many transactions where consumers deal infrequently.”⁷⁴ Second, the creditor “has access to a variety of information systems which are unavailable to consumers.”⁷⁵ Third, a creditor “has recourse to contractual devices that render the routine return of seller misconduct costs to sellers relatively cheap and automatic.”⁷⁶ Fourth, “the creditor possesses the means to initiate a lawsuit and prosecute it to judgment where recourse to the legal system is necessary.”⁷⁷ The FTC also found that the risk reallocation inherent in the Holder Rule would discourage predatory practices and schemes because creditors would “simply not accept the risks generated by the truly unscrupulous merchant. The market will be policed in this fashion and all parties will benefit accordingly.”⁷⁸

D. The Truth in Lending Simplification and Reform Act

1. The Impetus for Reform

Soon after the enactment of TILA, Congress realized that an amendment to simplify TILA and its required disclosures

69. *Id.* at 53,522–23.

70. *Id.* at 53,523.

71. *Id.*

72. Preservation of Consumers’ Claims and Defenses, Statement of Basis and Purpose, 40 Fed. Reg. 53,506, at 53,523 (Nov. 18, 1975).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Preservation of Consumers’ Claims and Defenses, Statement of Basis and Purpose, 40 Fed. Reg. 53,506, at 53,523 (Nov. 18, 1975).

was necessary to accomplish its goals. The three basic goals of the original version of TILA were to stabilize the market, to enable consumers to shop for the best credit, and to protect consumers against unfair billing.⁷⁹ TILA aimed to accomplish these goals by requiring creditors to disclose the annual percentage rate on all consumer transactions.⁸⁰ The annual percentage rate is expressed as "the yearly interest on the loan, together with all other charges 'incident to the extension of credit,' as a percentage of the average balance."⁸¹ The legislature hoped that this credit term would provide a uniform "yardstick" for comparison of interest rates.⁸² However, the statute and its accompanying interpretations were technically complex, making it difficult for creditors to comply with and for consumers to comprehend.⁸³ These concerns resulted in the Truth in Lending Simplification and Reform Act (the "Simplification Act"), which amended TILA to the form that generally now reflects the current state of the law.⁸⁴

2. A General Overview of the Current Law

The Simplification Act reduced and streamlined the disclosures for closed-end transactions.⁸⁵ The Simplification Act requires creditors to group together all mandatory disclosures and to set them off from other terms of the contract, thereby isolating the disclosures from any unrelated information.⁸⁶ This change allowed the Board to draft "model forms," which, if used, demonstrate compliance with TILA, thus creating the streamlined and now well-known disclosure

79. Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth in Lending Act*, 80 GEO. L.J. 233, 233 (1991) (citing 15 U.S.C. § 1602(a) (1988)) (critiquing the legislative drafting process of TILA).

80. *Id.* (citing 15 U.S.C. § 1606).

81. *Id.*

82. *Id.* (citing 107 CONG. REC. 6854 (1961) (statement of Sen. Douglas)).

83. Ralph J. Rohner, *Truth in Lending "Simplified": Simplified?*, 56 N.Y.U. L. REV. 999, 1005-06 (1981).

84. Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, 94 Stat. 168 (codified in scattered sections of 15 U.S.C.).

85. Rohner, *supra* note 83, at 1008. Closed-end credit is traditionally thought of as consumer credit transactions, involving direct loans and installment credit sales of goods or services, where credit is repayable over a fixed term. ROHNER & MILLER, *supra* note 2, ¶ 5.01, at 245. Reg. Z defines "closed-end credit" as "consumer credit other than open-end credit." Regulation Z, 12 C.F.R. § 226.2(a)(10) (2008).

86. Rohner, *supra* note 83, at 1015.

statement.⁸⁷

A TILA disclosure is required for any extension of “consumer credit”⁸⁸ by a “creditor.”⁸⁹ If a disclosure is required, TILA differentiates between “open-end” and “closed-end” credit.⁹⁰ The main differences between open-end and closed-end credit is in the nature of the transaction.⁹¹ In a closed-end transaction, there is a single transaction and all elements are determinable at the outset.⁹² Through the disclosures, the consumer should clearly understand the total amount to be paid.⁹³ By contrast, consumers in open-end transactions such as credit cards are never given a complete “forward-looking” view of the transaction. While open-end creditors are required to provide initial and ongoing periodic disclosures, the continually evolving nature of the transaction prevents consumers from determining the total cost of credit at the time of entering into the contract.⁹⁴

3. *Change in the Definition of Creditor*

Prior to the Simplification Act, courts varied on who to classify as the original creditor and on what obligations to impose.⁹⁵ The 1968 version of TILA defined the term “creditor” as one “who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extensions of such credit”⁹⁶ Because “dealers and assignees routinely

87. *Id.*

88. Consumer credit is defined as credit “‘primarily for personal, family, or household purposes.’” ROHNER & MILLER, *supra* note 2, ¶ 2.04, at 64 (quoting 12 C.F.R. § 226.2(a)(12)).

89. A creditor is a person who “regularly” extends consumer credit (defined as more than twenty-five non-mortgage transactions in the preceding calendar year) that is subject to a finance charge or is payable by written agreement in more than four installments and to whom the obligation is initially payable. 12 C.F.R. § 226.2(a)(17).

90. SPANOGLIE ET AL., *supra* note 33, at 136–37.

91. ROHNER & MILLER, *supra* note 2, ¶ 5.01, at 247.

92. *Id.*

93. *Id.*

94. *Id.*

95. Rohner, *supra* note 83, at 1011 (“It is clear however, that, in fact, dealers and assignees routinely collaborate to generate consumer paper, and direct lenders depend on referrals from dealers and brokers. Who, here, extends the credit and who arranges it? Who must be identified, and who can be sued for violations? This situation led to considerable judicial freelancing on deciding what responsibilities rested on whom.”).

96. Regulation Z, 12 C.F.R. § 226.2(s) (2008).

collaborate to generate consumer paper," this issue had been litigated many times.⁹⁷

In this legislative environment, the United States Supreme Court ruled that where an assignee is intricately involved in the original transaction, the assignee is liable for TILA violations not under the assignee liability provision, but as an original creditor. The Supreme Court's reasoning in *Ford Motor Credit Co. v. Cenace* illustrates why it was logical to find that the seller and the assignee were both original creditors.⁹⁸ In *Cenace*, a Ford dealership assigned a purchaser's credit application to Ford Motor Credit Co. ("FMCC") prior to the completion of the transaction.⁹⁹ The dealer regularly dealt with this assignee and FMCC had to approve the finance instrument before the dealer extended credit.¹⁰⁰ FMCC prepared the credit application form and conditioned the transaction upon the acceptance of the credit application by FMCC.¹⁰¹

The Court relied on the Fifth Circuit's reasoning in *Meyers v. Clearview* to determine that FMCC was a statutory creditor. In *Meyers*, the assignee, although involved in the original transaction, wasn't assigned the contract until after the completion of the transaction.¹⁰² The court held that the finance company was an original creditor and reasoned that "in some consumer credit transactions there are multiple 'creditors,' a credit arranger and a credit extender. Where there is a credit arranger there must obviously be a credit extender, and both are original creditors under the Act and Regulation Z."¹⁰³ Like the *Meyers* court, the Supreme Court in *Cenace* focused on the dealer as an arranger of credit and FMCC as the extender of credit.¹⁰⁴ Accordingly, the Court

97. Rohner, *supra* note 83, at 1011.

98. See *Ford Motor Credit Co. v. Cenace*, 452 U.S. 155, 157 (1981).

99. *Id.* at 156.

100. *Id.*

101. *Id.* at 157.

102. *Id.* at 156-57 (analyzing *Meyers v. Clearview*, 539 F.2d 511, 515 (5th Cir. 1976)) ("The *Meyers* analysis applies with even greater force to the instant situation" (citations omitted)). FMCC had a higher degree of involvement in the original transaction than the finance company in *Meyers* since the entire transaction depended upon FMCC's approval. *Id.*

103. *Meyers*, 539 F.2d at 515; see also PRIDGEN, *supra* note 49, § 5:16, at 314 ("In other words, the dealer was viewed as a mere conduit or arranger of credit, while the real creditor was the third party financier.").

104. *Cenace*, 452 U.S. at 158 ("The facts negate any suggestion that the

held that both the dealer and the assignee were original creditors liable for TILA violations and reasoned that it would be “elevating form over substance to conclude that FMCC is not a creditor within the meaning of the Act.”¹⁰⁵

Despite the Supreme Court’s opinion in *Cenance*, Congress redefined the definition of creditor in the Simplification Act.¹⁰⁶ After the Simplification Act, TILA states that a creditor is defined as one that regularly extends consumer credit *and* is “the one to whom the debt arising from the consumer credit transaction is initially payable . . . on the face of the [note].”¹⁰⁷ The commentary to Reg. Z specifically declares that the dealer is the creditor even if the dealer simultaneously assigns the obligation.¹⁰⁸ Thus, after Congress changed the definition of creditor, a court can no longer find that an assignee is an original creditor, even on the exact facts of *Cenance* where the assignee generated the consumer paper containing the TILA violation.

E. Assignee Liability under TILA

1. Generally

By narrowing the definition of creditor, the Simplification Act significantly limits assignee liability.¹⁰⁹ Prior to the Simplification Act, many courts found an assignee liable for TILA violations because the assignees were “creditors” themselves.¹¹⁰ However, under the current statute, consumers must rely on TILA’s assignee liability provision in order to assert TILA violations against an assignee.¹¹¹ TILA’s assignee provision creates assignee liability for only those

dealers anticipated financing any of these transactions.”).

105. *Id.*

106. Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, 94 Stat. 168 (codified as amended in 15 U.S.C. § 1602(f)).

107. 15 U.S.C. § 1602(f) (2006).

108. Official Staff Commentary to Regulation Z, 12 C.F.R. pt. 226, supp. I, subpart A, cmt. 2(a)(17)(i)(2) (2008).

109. See *supra* Part II.D.3.

110. Rohner, *supra* note 83, at 1011. *Cenance* is one example. By classifying an assignee as an original creditor, the Court did not need to look to the assignee provisions of TILA. See *Cenance*, 452 U.S. at 157–58. However, after the change in definition of creditor, courts could no longer hold assignees liable as original creditors and had to look to the assignee provision in TILA in order to find assignees liable for TILA violations.

111. See Truth in Lending Act § 131, 15 U.S.C. § 1641 (2006).

violations "apparent on the face of the disclosure statement."¹¹² TILA gives two non-exclusive examples of violations that are apparent on the face of the document: a disclosure determined to be incomplete or inaccurate, and a disclosure that does not use the terms supplied in TILA.¹¹³

Other changes to TILA further limit assignee liability. Before the Simplification Act, the assignee liability clause provided for assignee liability when there was a violation on the face of the contract "without [the assignee's] knowledge to the contrary."¹¹⁴ The phrase "without knowledge to the contrary" arguably included liability for an assignee who had knowledge of the violation.¹¹⁵ The Simplification Act removed the phrase "without knowledge to the contrary," seeming to provide for assignee liability only where the violation is on the face of the document.¹¹⁶ Although most consumers must look to this section of TILA to determine assignee liability, it is not the only place that addresses the subject of assignee liability in consumer credit contracts.¹¹⁷

2. HOEPA's Assignee Liability

Although Congress originally created a very limited assignee liability provision for TILA, in 1994 Congress

112. *Id.* When a consumer seeks money damages under section 1640 in a transaction that is not secured by real property, the assignee is liable only for those disclosures which are apparent on the face of the documents assigned. *Id.* § 1641(a). In the case of a transaction secured by real property, the assignee is liable if the violation is apparent on the face of the disclosure statement when compared to the note, to any itemization of the amount financed, or to any other disclosure disbursement. *Id.* § 1641(e). These rules do not apply to involuntary assignees. *Id.* § 1641(a).

113. *Id.*

114. 15 U.S.C. § 1641 (1979) (current version at 15 U.S.C. § 1641 (2006)) ("In any action or proceeding by or against any subsequent assignee of the original creditor without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgement of receipt by a person to whom a statement is required to be given pursuant to this subchapter shall be conclusive proof of delivery thereof and, unless the violation is apparent on the face of the statement, of compliance with this part.").

115. *See id.*

116. Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, 94 Stat. 182 (codified as amended in 15 U.S.C. § 1641 (2006)). The removal of this language has made some courts find that Congress intended actual knowledge to be independent of what can be discovered from the face of the document, and thus insufficient to trigger assignee liability. *E.g.*, *Ramadan v. Chase Manhattan Corp.*, 229 F.3d 194, 199 (3d Cir. 2000).

117. *See infra* Part II.E.2.

explicitly recognized that expanded assignee liability can be a powerful mechanism for the private enforcement of the TILA's provisions.¹¹⁸ Due to the wide-spread epidemic of lending abuses in the mortgage market Congress expanded TILA's assignee liability for a limited group of high-interest and high-fee home equity loans.¹¹⁹ Congress intended that broader assignee liability would enforce compliance with TILA and encourage assignees to police the primary mortgage market.¹²⁰

In 1994, Congress enacted the Home Ownership and Equity Protection Act ("HOEPA"), which amended TILA and created a duty on the secondary market of lenders to restrain predatory lending practices.¹²¹ HOEPA creates a special class of high-cost mortgages that are subject to additional regulation.¹²² Mortgage loans are covered by HOEPA if their terms exceed a certain price threshold.¹²³ Where a loan is covered by HOEPA, an assignee "steps squarely into the shoes of the creditor" and is liable for all claims and defenses.¹²⁴ An assignee's only defense is to prove that a reasonable person who exercised due diligence could not have determined that the mortgage exceeded HOEPA's price threshold based on the loan documents.¹²⁵

In enacting HOEPA, the Senate reported that in

118. See Lisa Keyfetz, *The Home Ownership and Equity Protection Act of 1994: Extending Liability for Predatory Subprime Loans to Secondary Mortgage Market Participants*, 18 LOY. CONSUMER L. REV. 151, 151-52 (2005).

119. *Id.*; Peterson, *supra* note 57, at 2241 ("HOEPA goes further than any other federal statute in creating assignee liability for predatory mortgage lending.").

120. See Keyfetz, *supra* note 118, at 151-52.

121. Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, 108 Stat. 2190 (codified as amended in 15 U.S.C. § 1641(d) (2006)). The term "predatory lending" describes the practice of loan originators of subprime mortgages who use manipulative techniques like fraud and deception to extend credit in ways intended to strip borrowers of the equity in their homes. Keyfetz, *supra* note 118, at 153. These loans come with terms that are so disadvantageous to the borrower that there is little likelihood that the borrower can repay the loan, thus resulting in an unreasonable risk of foreclosure. *Id.* at 153-54. Over the last decade, there has been tremendous growth in the amount of predatory lending, which has resulted in an extremely high number of foreclosures in a very short period of time. *Id.* at 158.

122. Peterson, *supra* note 57, at 2226 (citing DEE PRIDGEN, *supra* note 49, § 9:25).

123. *Id.*

124. ROHNER & MILLER, *supra* note 2, ¶ 12.06, at 858.

125. *Id.*

expanding assignee liability it would "ensure that the High Cost Mortgage market polices itself. . . . [W]ith loans sold on a regular basis, one unscrupulous player can create havoc in a community by selling loans as fast as they are originated. Providing assignee liability will halt the flow of capital to such lenders."¹²⁶ Assignee liability links the parties involved in the mortgage production, forcing those who feed capital to predatory lenders to internalize the costs imposed on consumers.¹²⁷ Congress further reported that it intended this amendment to mirror the FTC Holder Rule.¹²⁸ Congress reasoned that since the FTC Holder Rule had neither restricted the flow of consumer credit nor interfered with the securitization of auto loans, HOEPA would not either.¹²⁹

F. Creditor Liability for Common Truth in Lending Violations

When a transaction is subject to TILA, the creditor must disclose the cost of financing to the consumer and the failure to do so violates the law.¹³⁰ Despite TILA's disclosure requirements, creditors continue to evade disclosing the true cost of credit to consumers.¹³¹ There are many manners in which creditors continue to violate TILA.¹³² This section will discuss two of the common TILA violations—the hidden finance charge, and the spurious characterization of open-end credit.¹³³

1. The Hidden Finance Charge

To escape TILA's disclosure requirements, many creditors "hide the finance charge" by increasing the price of the item while stating that there is no finance charge.¹³⁴ Soon

126. S. REP. NO. 103-169, at 28 (1994), as reprinted in 1994 U.S.C.C.A.N. 1881, 1912.

127. Keyfetz, *supra* note 118, at 169.

128. *Id.* at 182 (citing S. REP. NO. 103-169, at 1912).

129. S. REP. NO. 103-169, at 1912 ("The F.T.C. rule has not significantly restricted the flow of consumer credit and or interfered with the securitization of auto loans.").

130. *See supra* Part II.D.2.

131. *See infra* Parts II.F.1-2.

132. *See generally* James Lockhart, *What Constitutes "Finance Charge" under § 106(a) of the Truth in Lending Act or Applicable Regulations*, 154 A.L.R. FED. 431 (1999).

133. *See infra* Parts II.F.1-2.

134. *See, e.g.,* *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356 (1973);

after the enactment of TILA, the Supreme Court recognized the inclination of creditors to “bury the cost of credit” by hiding finance charges in a transaction.¹³⁵ In *Mourning v. Family Publications Service, Inc.*, the Court upheld the Board’s authority to promulgate the “four installment rule” under Reg. Z.¹³⁶ The four installment rule requires TILA disclosures in consumer credit transactions either when a debt is paid in more than four installments or if there is a finance charge.¹³⁷ The Court confirmed the Board’s authority to create the four-installment rule because it was reasonably related to the TILA’s objectives and because the Board needed to be prepared for the “subterfuges” that creditors might use to avoid TILA.¹³⁸ The Court stated that Congress was clearly aware that merchants may try to avoid giving disclosures by concealing credit charges.¹³⁹

Despite the promulgation of the four installment rule, hidden finance charges continue to be a pervasive TILA violation.¹⁴⁰ Although disclosure statements are required if there are to be more than four installment payments, creditors still avoid disclosing the cost of credit by inflating the price of an item and giving the required disclosure, but then listing the finance charge as less than it is or not listing a finance charge at all.¹⁴¹

TILA defines a finance charge as the sum of all charges

Gibson v. Bob Watson Chevrolet-Geo, Inc., 112 F.3d 283 (7th Cir. 1997); Yazzie v. Reynolds, 623 F.2d 638 (10th Cir. 1980); *In re Stewart*, 93 B.R. 878 (Bankr. E.D. Pa. 1988).

135. *Mourning*, 411 U.S. at 366–67 (“One means of circumventing the objectives of the Truth in Lending Act, as passed by Congress, was that of ‘burying’ the cost of credit in the price of goods sold. Thus in many credit transactions in which creditors claimed that no finance charge had been imposed, the creditor merely assumed the cost of extending credit as an expense of doing business, to be recouped as part of the price charged in the transaction. Congress was well aware, from its extensive studies, of the possibility that merchants could use such devices to evade the disclosure requirements of the Act. The Committee hearings are replete with suggestions that such manipulation would render the Act a futile gesture in the case of goods normally sold by installment contract.”).

136. *Id.* at 368–69.

137. Regulation Z, 12 C.F.R. § 226.2(a)(17) (2008).

138. *Mourning*, 411 U.S. at 371.

139. *Id.*

140. See, e.g., Gibson v. Bob Watson Chevrolet-Geo, Inc., 112 F.3d 283 (7th Cir. 1997); Yazzie v. Reynolds, 623 F.2d 638 (10th Cir. 1980); *In re Stewart*, 93 B.R. 878 (Bankr. E.D. Pa. 1988).

141. See, e.g., Yazzie, 623 F.2d 638.

directly or indirectly imposed by the creditor as an incident to the extension of credit.¹⁴² A charge is a finance charge if it is of a type not payable in a comparable cash transaction.¹⁴³ Courts hold that a hidden finance charge is a TILA violation where the charge is "separately imposed."¹⁴⁴ In *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, the transaction included an extended warranty.¹⁴⁵ The TILA disclosure showed that the dealer paid the entire amount for the warranty to a third-party warrantor, but in fact, the dealer retained a portion of the payment.¹⁴⁶ The court held that the dealer had violated TILA if it had systematically marked up the price for an extended warranty in credit transactions without disclosing it as a finance charge.¹⁴⁷ This concealment deprived the consumer of making an intelligent choice and led her to believe that she had to pay the additional fee for the extended warranty regardless of whether she paid in cash or credit.¹⁴⁸ The hidden finance charge violation has occurred in many different contexts and has been a prevalent violation since the inception of TILA.¹⁴⁹

2. *Spurious Open-End Credit Transactions*

Another common TILA violation is where a creditor spuriously characterizes a transaction as open-end rather than closed-end.¹⁵⁰ Transactions characterized as open-end require periodic disclosures because they contemplate repeated extensions of credit by the creditor.¹⁵¹ On the other hand, with closed-end transactions there is only one extension of credit and therefore disclosure of the total finance charge,

142. Truth in Lending Act § 106, 15 U.S.C. § 1605(a) (2006).

143. *Id.*

144. Griffith, *supra* note 5, at 277.

145. *Gibson*, 112 F.3d at 284.

146. *Id.*

147. *Id.* at 287.

148. *Id.*

149. See Lockhart, *supra* note 132, § 5. Hidden finance charges have been addressed in a variety of contexts: discounts to cash customers or surcharges to non-cash customers; license, title, and registration fees; attorneys fees; credit application fees; courier or delivery fees; handling or service charges; late charges; membership fees; retained amounts listed as other fees; and discount or holdback in assignment of commercial paper. *Id.*

150. See, e.g., *Meyers v. First Tennessee Bank, N.A.*, 136 F. Supp. 2d 1225 (M.D. Ala. 2001); *Long v. Fidelity Water Sys.*, No. C-97-20118 RMW, 2000 WL 760328 (N.D. Cal. Mar. 16, 2000).

151. See *supra* Part II.D.2.

the total number of payments, and the amount financed is required.¹⁵² In cases involving closed-end transactions, some creditors try to avoid giving the comprehensive closed-end disclosures by framing the transaction as an open-end credit transaction, thereby avoiding disclosure of the total finance charge.¹⁵³ In an attempt to prevent this behavior, Congress revised the definition of open-end credit in the Simplification Act.¹⁵⁴ Under the current law, creditors must have a reasonable expectation of repeated transactions with the consumer in order to classify a credit transaction as open-end.¹⁵⁵

Despite this revision, the issue of spurious open-end credit characterization appeared in a number of cases in the 1990s.¹⁵⁶ In *Meyers v. First Tennessee Bank, N.A.*, the transaction involved the purchase of a satellite dish.¹⁵⁷ The seller told Meyers, the consumer, that he could pay the satellite dish off in two years at the rate of \$59.55 a month.¹⁵⁸ The dealer classified the transaction as open-end with the proper disclosures and issued the consumer a credit card to purchase the satellite system.¹⁵⁹ When the bill came, the consumer realized that the transaction could not be paid off in the amount of time stated because the stated charges did not include the cost of financing.¹⁶⁰ Thus, because the creditor did not make the closed-end disclosures, the consumer did not understand the true cost of the transaction.¹⁶¹ The creditor argued that since the satellite programming would only last one year, it reasonably believed that customers would make repeat purchases on the card, which was why they characterized the transactions as open-end.¹⁶² The court found that due to the factual circumstances of the case, particularly that the defendant did not operate

152. See *supra* Part II.D.2.

153. ROHNER & MILLER, *supra* note 2, ¶ 5.01, at 249.

154. *Id.* at 248–49. Previously, the prospect of repeat transactions only had to be possible. *Id.*

155. Truth in Lending Act §103, 15 U.S.C. § 1602 (2006).

156. SPANOGLE ET AL., *supra* note 33, at 156.

157. *Meyers v. First Tennessee Bank, N.A.*, 136 F. Supp. 2d 1225, 1227 (M.D. Ala. 2001).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1230.

retail stores where additional programming could be purchased, it was not presumptively reasonable for the creditor to expect repeat transactions and thus to characterize the transaction as open-end.¹⁶³

III. IDENTIFICATION OF THE PROBLEM

Congress enacted TILA in 1968 with the purpose of enhancing economic stabilization and strengthening competition among various financial institutions through the informed use of credit.¹⁶⁴ Currently, TILA provides for liability of an original creditor for many of the common TILA violations like the hidden finance charge and the spurious characterization of a transaction as open-end.¹⁶⁵ However, TILA imposes assignee liability only when the violation is "apparent on the face of the disclosure statement," and after the Simplification Act, an assignee may not be defined as an original creditor even where it is intricately involved in the original transaction.¹⁶⁶ Yet, in 1994, through HOEPA, Congress expanded assignee liability for some mortgages in order to respond to and rectify the problems created by predatory lending in the mortgage market.¹⁶⁷

Like the problem of predatory lending in the context of mortgages, TILA's narrow assignee liability provision creates problems in the consumer credit market. Broader assignee liability, similar to HOEPA, could rectify this problem. The

163. *Meyers v. First Tennessee Bank, N.A.*, 136 F. Supp. 2d 1225, 1231-32 (M.D. Ala. 2001). Courts are split on whether the mischaracterization of open-end credit transactions is appropriate for summary judgment. *See id.*; *Long v. Fidelity Water Sys.*, No. C-97-20118 RMW, 2000 WL 760328 (N.D. Cal. March 16, 2000); *Benion v. Bank One, Dayton, N.A.*, 144 F.3d 1056 (7th Cir. 1998). In *Benion v. Bank One, Dayton, N.A.*, the court granted summary judgment for the defendant since the credit card could be used to buy related goods. *Id.* at 1060. The court acknowledged that this mischaracterization was an "abuse of the open-end credit provision" but declined to find so in its holding because "courts should generally leave the plugging of loopholes" to the Federal Reserve Board. If the Federal Reserve Board cannot formulate such a rule as an expert in its administrative discretion, then the court "surely cannot formulate it as a matter of statutory interpretation." *Id.* at 1059. Thus, although courts may decline to find overt TILA violations in this context, they do so not on the grounds that this mischaracterization is not an abuse of the truth in lending principles but instead as a matter of statutory interpretation. *See id.*

164. *See supra* Part II.B.

165. *See supra* Part II.F.

166. *See supra* Parts II.E.1, II.D.3.

167. *See supra* Part II.E.2.

narrow definition of creditor and the limited scope of assignee liability create problems in several ways. First, the revised definition of creditor allows assignees who play an integral role in creating a TILA violation to escape liability.¹⁶⁸ Second, Congress's omission of the phrase "without knowledge to the contrary" from the assignee liability provision implies that an assignee may have knowledge of a TILA violation in an assigned contract and still escape liability.¹⁶⁹ Third, TILA's limitation of assignee liability directly contradicts the Holder Notice that is included in all contracts for consumer goods and services, and thus frustrates consumer expectation.¹⁷⁰ Finally, narrowing assignee liability contradicts the goal and purpose of TILA, which is to promote the meaningful disclosure of the cost of credit.¹⁷¹

A. The Definition of Creditor Allows Assignees That Participate in Creating TILA Violations to Escape Liability

An assignee may escape liability even where it participates in creating the violation because of TILA's amended definition of creditor. The amendment resulted from the differing interpretations by the courts regarding whether they could define an assignee as an original creditor.¹⁷² Although the amended definition does clarify that the disclosure responsibility clearly rests with the seller and stops the differing interpretations, it leads to an absurdity.¹⁷³ Can a dealer really be considered an "original creditor" when all it does is arrange for the immediate assignment of the contract?¹⁷⁴ "Even though the note or contract initially may be payable to the dealer, theoretically—and as a matter of economics—the party whose money is at risk is the financier."¹⁷⁵ Thus, in its quest for simplicity, Congress redefined creditor in a way that allows an assignee to be intricately involved in the original transaction, like FMCC was in the *Cenance* case, yet completely escape assignee

168. See *infra* Part III.A.

169. See *infra* Part III.B.

170. See *infra* Part III.C.

171. See *infra* Part III.D.

172. Rohner, *supra* note 83, at 1010.

173. *Id.* at 1012–13.

174. *Id.* at 1013.

175. *Id.* at 1012.

liability because it is not the party to whom the note is originally payable.¹⁷⁶

B. TILA Allows Assignees with Knowledge of the Violation to Escape Liability

An assignee who has knowledge of a violation can escape liability because of TILA's narrow assignee liability provision. TILA limits assignee liability to only those violations that are apparent on the face of the disclosure statement.¹⁷⁷ With the Simplification Act, Congress removed the phrase "without knowledge to the contrary."¹⁷⁸ Therefore, it would seem that an assignee will escape liability where the violation is not apparent on the face of the contract, even where the assignee has knowledge—either constructive or actual—of a violation.

The principles that favor limiting assignee liability do not arise where an assignee knows of a violation. Congress narrowed assignee liability based on the principle that an assignee should not be liable where it can neither detect nor control the violation.¹⁷⁹ In essence, creating assignee liability where the violation is apparent on the face of the document only allows for liability of an assignee who would have known of the violation had it examined the disclosure.¹⁸⁰ This creates no duty on the part of an assignee to look beyond the disclosure.¹⁸¹ Given the rationale for limiting an assignee's liability—i.e., no duty of inquiry and no liability for violations that an assignee cannot control—the lack of liability for an assignee when it has knowledge of a violation is illogical.¹⁸² The concerns that actuate the limitation are void because the assignee has no duty of inquiry; it already knows of the violation and it has control since it can easily decide not to

176. See *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155 (1981).

177. Truth In Lending Act § 131, 15 U.S.C. § 1641(b) (2006).

178. See *id.*

179. ROHNER & MILLER, *supra* note 2, ¶ 12.06, at 854.

180. See *id.* ("Congress also realized that assignees were simply not in a position to guarantee TIL compliance by the assignor in all respects, and that the assignee's ability to police the creditor's practices was largely limited to providing proper forms and then reviewing the accuracy and completeness of the disclosure statements that accompanied the assigned paper.").

181. Griffith, *supra* note 5, at 314 ("The plain language of the statute does not require a resort to matters outside the disclosure statement or documents assigned.").

182. *Id.* at 317.

take the contract.¹⁸³

C. TILA's Interaction with the Holder Rule Frustrates Consumer Expectation

TILA's assignee liability rule contradicts consumer expectation of assignee liability because it is in opposition with the statement in the Holder Notice. The Holder Rule requires credit sellers to include in all consumer credit contracts a clause stating that the holder of the contract (the assignee) is subject to all claims that the debtor could assert against the original creditor.¹⁸⁴ Yet TILA's assignee liability provision states that an assignee is not subject to all claims the debtor could assert against the original creditor, but rather only those that are apparent on the face of the contract.¹⁸⁵ Thus, while the contract states that the assignee is liable for all TILA violations the consumer could assert against the original creditor, TILA states that the assignee is not liable.

D. TILA's Limited Assignee Liability Is at Odds with Its Policy and Goals

TILA's limitation of assignee liability directly conflicts with the purpose of TILA. Congress enacted TILA with a simple goal—to ensure the meaningful disclosure of the cost of credit.¹⁸⁶ Allowing assignees to escape liability is at odds with this purpose because holding assignees liable would help ensure the disclosure of the cost of credit to consumers. As indicated by Congress's analysis in enacting HOEPA and the FTC's reasoning for promulgating the Holder Rule, an assignee has the ability to spread the cost of violations and police the market, thus ensuring that creditors comply with TILA's requirements.¹⁸⁷ Therefore, Congress's limitation of assignee liability directly undercuts the aims of TILA by not employing other means of ensuring creditor compliance.

183. *See id.*

184. Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.2 (2009).

185. Truth In Lending Act § 131, 15 U.S.C. § 1641(a) (2006).

186. *See supra* Part II.B.

187. *See supra* Parts II.C, II.E.2.

IV. TILA'S LIMITED ASSIGNEE LIABILITY PROVISION FRUSTRATES TILA'S PURPOSE

In light of TILA's goal of compelling lenders to disclose the true cost of financing, Congress should not have created such limited assignee liability. Broad assignee liability helps attain TILA's purpose because it ensures that the consumer credit market polices itself. The effectiveness of broad assignee provisions is illustrated by the FTC's promulgation of the Holder Rule and Congress's expansion of assignee liability with HOEPA.¹⁸⁸ Yet under TILA's current provisions, assignees are liable for very few violations¹⁸⁹ and the definition of creditor is limited to parties to which the obligation is initially payable.¹⁹⁰ This section will demonstrate that these provisions permit assignees to escape liability even where they play an integral role in the creation of disclosure statements and have actual or constructive knowledge of TILA violations.¹⁹¹

Moreover, not only does limited assignee liability conflict with TILA's purpose, it also frustrates consumer expectations. Because most finance agreements subject to TILA contain the Holder Notice,¹⁹² consumers expect assignee liability where there are violations by the original creditor. This section also will analyze how many courts allow assignees to escape liability by finding that TILA abrogates the statement of assignee liability in the Holder Notice.¹⁹³

Original creditors may be liable for many common TILA violations like the hidden finance charge or the mischaracterization of open-end credit,¹⁹⁴ yet the extent of liability of assignees for these prevalent violations is not as clear.¹⁹⁵ Basic violations such as the failure to give TILA disclosures, the presence of mathematical errors or blanks on the form, and the failure to use the required terminology are considered to be apparent on the face of the document and clearly give rise to assignee liability.¹⁹⁶ However, most TILA

188. See *supra* Parts II.C, II.E.2.

189. See *supra* Part II.E.1.

190. See *supra* Part II.D.3.

191. See *infra* Parts IV.A–B.

192. See *supra* Part II.C.

193. See *infra* Part IV.C.

194. See *supra* Part II.F.

195. See *infra* Parts IV.A–B.

196. ROHNER & MILLER, *supra* note 2, ¶ 12.06, at 855.

violations are not so straightforward. The question of assignee liability is especially difficult where (1) the assignee is involved in creating the TILA violation yet cannot be classified as an "original creditor," (2) the assignee has knowledge of the violation, and (3) the Holder Notice is included in the contract.¹⁹⁷

A. *The Definition of Creditor*

By changing the definition of creditor with the Simplification Act, Congress undeniably intended to limit assignee liability.¹⁹⁸ However, it is questionable whether Congress foresaw that its efforts to clarify TILA would protect assignees that play an integral role in TILA violations.

The Supreme Court's reasoning in *Cenance* demonstrates that it is logical to find assignee liability for TILA violations when the assignee is intricately involved in the original transaction, the extension of credit, and the creation of the TILA violation.¹⁹⁹ In *Cenance*, the Court found that such conduct on the part of the assignee led to the classification of the assignee as an original creditor.²⁰⁰ Despite Congress's redefinition, the Court's reasoning in *Cenance* is still logical: an assignee who has a high level of control over the original transaction and is instrumental in creating the TILA violation acts more like an original creditor and should not escape liability just because it is not defined as the original creditor. To allow an assignee to escape liability simply because Congress changed the definition of creditor elevates form over substance.

197. See PRIDGEN, *supra* note 49, § 5:16, at 317 ("This means that assignees will be liable for very few TILA violations."); see, e.g., *Perry v. Household Retail*, 268 F.3d 1067 (11th Cir. 2001); *Balderos v. City Chevrolet*, 214 F.3d 849 (7th Cir. 2000) (stating that there was no assignee liability where the additional charge only passed on to credit customers); *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703 (11th Cir. 1998) (stating that dealer up-charge was not apparent on face of the document); *Walker v. Wallace Auto Sales, Inc.*, 155 F.3d 927 (7th Cir. 1998) (determining that actual knowledge was insufficient to create assignee liability); *Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 2d 563 (E.D. Va. 2001) (deciding that there was no assignee liability where component of the cash price was incorrect); *Brown v. Coleman Invs.*, 993 F. Supp. 416 (M.D. La. 1998) (stating that license fee up-charge did not create assignee liability).

198. ROHNER & MILLER, *supra* note 2, ¶ 12.06, at 859–60.

199. See *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155 (1981).

200. *Id.*

Moreover, TILA's definition of creditor seems even more irrational in the context of "spurious" open-end credit violations. In *Perry v. Household Retail Services, Inc.*, the consumer in a spurious open-end credit transaction contended that the finance company was "far more than just an 'assignee' [of the] transaction."²⁰¹ Rather, he argued that the creditor and assignee were "active participants in a scheme to evade TILA disclosure requirements" and introduced evidence demonstrating the assignee's control over grants and denials of credit.²⁰² The court held that the assignee's awareness was sufficient to make the violation apparent on the face of the document.²⁰³

However, most courts find that a close association between the creditor and assignee does not make a violation apparent on the face of the contract.²⁰⁴ In *Mayfield v. General Electric Capital Corp.*, the defendant was in the business of contracting with merchants to finance the purchases of consumer goods and services.²⁰⁵ The assignee provided the merchants with all of the credit forms and instructed the merchants on how to complete them.²⁰⁶ The contracts were subsequently assigned to the assignee once it approved the credit.²⁰⁷ The consumer alleged that the finance company was liable for the violations because it was intimately involved in the transaction and because there would not have been a transaction at all without the finance company's actions.²⁰⁸ The court held that the assignee was not liable since the consumers did not allege that there was a violation on the face of the disclosure and because TILA's amended definition of creditor does not encompass arrangers of credit.²⁰⁹

As the *Mayfield* and *Perry* cases demonstrate, finance companies commonly play a much greater role in TILA violations than simply that of an assignee.²¹⁰ Finance

201. *Perry v. Household Retail Servs., Inc.*, 953 F. Supp. 1370, 1375 (M.D. Ala. 1996).

202. *Id.*

203. *Id.* at 1376.

204. *See Mayfield v. General Electric Capital Corp.*, No. 97 Civ. 2786, 1999 U.S. Dist. LEXIS 4048, at *14-17 (S.D.N.Y. Mar. 31, 1999).

205. *Id.* at *2.

206. *Id.*

207. *Id.*

208. *Id.* at *11.

209. *Id.* at *14-17.

210. *See Perry v. Household Retail Servs. Inc.*, 953 F. Supp. 1370, 1375 (M.D.

companies often develop and implement the financing scheme, recruiting merchants and dealers who then solicit buyers.²¹¹ In addition, finance companies create the forms, train the sellers, and retain complete control over the credit process, including the ability to grant or deny financing.²¹² Despite the finance company's heavy involvement in the credit process, the law nevertheless does not consider the finance company a creditor because it is not the entity to which the contract is initially payable.²¹³ The merchants and dealers are considered the "original creditor" even when all they do is arrange for the immediate assignment of the contract.²¹⁴ When one combines this absurd definition of creditor with TILA's narrow provision for assignee liability, the result is that an assignee may reap the benefit of a TILA violation by retaining control of the transaction while at the same time escaping TILA liability altogether.²¹⁵

B. Assignee Knowledge

While an assignee may only be liable for those violations that are apparent on the face of the contract, it is unclear whether an assignee's knowledge also creates assignee liability because the violation is "apparent on the face of the disclosure statement."²¹⁶ Many consumers have attempted to argue that an assignee's knowledge of the TILA violation makes the violation apparent and therefore makes the assignee liable for the TILA violation.²¹⁷ However, most courts hold that an assignee's knowledge of the TILA violation does not create assignee liability.²¹⁸

Ala. 1996) (describing finance company as intimately involved); *Mayfield v. General Electric Capital Corp.*, No. 97 Civ. 2786, 1999 U.S. Dist. LEXIS 4048, at *2 (S.D.N.Y. Mar. 31, 1999) (demonstrating finance company created forms that had the TILA violation).

211. See *Perry*, 953 F. Supp. at 1375; *Mayfield*, 1999 U.S. Dist. LEXIS 4048, at *2.

212. See *Perry*, 953 F. Supp. at 1375; *Mayfield*, 1999 U.S. Dist. LEXIS 4048, at *2.

213. See *Perry*, 953 F. Supp. at 1375; *Mayfield*, 1999 U.S. Dist. LEXIS 4048, at *2.

214. Rohner, *supra* note 83, at 1011.

215. See, e.g., *Mayfield*, 1999 U.S. Dist. LEXIS 4048.

216. Griffith, *supra* note 5, at 311 (citing 15 U.S.C. § 1641(a) (2006)).

217. See *infra* Part IV.B.1.

218. See *infra* Part IV.B.1.

1. *Courts Find That Assignees' Knowledge of TILA Violations Is Insufficient to Create Liability*

a. *Assignee Knowledge from the Business Practice*

Consumers have argued that an assignee's knowledge of an industry creditor's common business practice that violates TILA made that violation apparent on the face of the contract. In *Taylor v. Quality Hyundai, Inc.*, the consumer argued that the assignee's awareness of the creditor's business practice of retaining part of the extended warranty made the violation apparent on the face of the contract.²¹⁹ The consumer asserted that as a sophisticated and active participant in the market, the finance company must have known of the common industry practice whereby car dealers retained a part of the extended warranty charge as a commission.²²⁰ The U.S. Court of Appeals for the Seventh Circuit rejected this argument, refusing to adopt a rule that would "impose a duty of inquiry on financial institutions that serve as assignees."²²¹ The *Taylor* holding signifies that knowledge of a common practice in an industry may not make a violation apparent on the face of the document.²²² Other courts that have addressed this question follow similar reasoning.²²³

b. *Assignee Knowledge from Public Documents*

Other consumers have argued that an assignee's knowledge of a TILA violation from publicly available documents creates assignee liability. In *Green v. Levis Motors*, Green purchased a car from a dealer.²²⁴ The retail installment contract listed the amount paid to the state for the license fee as forty dollars, but in fact, the amount paid to the state was only twenty-two dollars.²²⁵ The court in *Green* found that the dealer's up-charge violated TILA.²²⁶ The

219. *Taylor v. Quality Hyundai, Inc.*, 150 F.3d 689, 691 (7th Cir. 1998).

220. *Id.* at 694.

221. *Id.*

222. *See id.*

223. *See, e.g., Ramadan v. Chase Manhattan Corp.*, 229 F.3d 194, 198 (3rd Cir. 2000); *Green v. Levis Motors, Inc.*, 179 F.3d 286, 295 (5th Cir. 1999); *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 709 (11th Cir. 1998).

224. *Green*, 179 F.3d at 287.

225. *Id.* at 287-88.

226. *Id.* at 294.

consumer argued that the assignee was also liable because it should have known that there was an up-charge on the state license fee.²²⁷ The state license fee table was a public document, and therefore Green contended that as an experienced player in the credit industry, the finance company should have been aware of the up-charge.²²⁸ The U.S. Court of Appeals for the Fifth Circuit found that since the fee table was not an assigned document in the transaction, and because TILA does not contemplate the subjective knowledge of the assignee, the assignee was not liable.²²⁹ Hence, implied knowledge from public documents is likewise insufficient to create liability.²³⁰

c. Assignee Knowledge from Assigned Documents

Consumers have also argued that a TILA violation apparent to an assignee through documents assigned during the transaction should create assignee liability. TILA creates liability for violations that can be determined from the face of the disclosure statement *and other documents assigned*.²³¹ Thus the phrase “and other documents assigned” can be critical for a consumer who seeks to prove assignee liability.²³²

In *Ellis v. General Motors Acceptance Corp.*, the consumer sought to show that the violation was apparent on the face of the contract based on the finance company’s knowledge of the violation from assigned documents.²³³ In *Ellis*, the consumers purchased a car and an extended warranty, which were both financed through a retail installment contract.²³⁴ The contract listed the price paid to the mechanic for the extended warranty as \$1195, but the actual amount paid was considerably less.²³⁵ The contract was immediately assigned to GMAC, who then paid the

227. *Id.* at 295.

228. *Id.*

229. *Id.*

230. See *Green v. Levis Motors, Inc.*, 179 F.3d 286, 295 (5th Cir. 1999).

231. 15 U.S.C. § 1641(a)(1) (2006) (emphasis added).

232. NAT’L CONSUMER LAW CTR., *TRUTH IN LENDING* § 7.3.2.2, at 450 (5th ed. 2003).

233. *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 709 (11th Cir. 1998).

234. *Id.* at 705.

235. *Id.*

mechanic a lesser amount for the extended warranty.²³⁶ Thus, GMAC was assigned the document, which stated that the extended warranty cost \$1195, and yet GMAC wrote the check for a lesser amount. This inconsistency demonstrated to GMAC that the warranty cost stated on the contract was inflated and therefore that the contract contained a typical "hidden finance charge" TILA violation.²³⁷ The consumer argued that the misstated cost of the extended warranty, where the assignee knew that the amount paid was different than that on the loan document, equated to actual knowledge of the violation.²³⁸ However, the Eleventh Circuit held that where the evidence is extraneous to the disclosure statement, there is no assignee liability.²³⁹ Thus, although the assignee had knowledge because of the documents assigned, the court held that this knowledge was not sufficient to find assignee liability.²⁴⁰

d. Assignee's "Special" Knowledge

Another manner in which consumers have attempted to impose assignee liability is by arguing that an assignee's special relationship with the original creditor demonstrates knowledge of the TILA violation. The finance company in *Balderos v. City Chevrolet* charged the dealer a fifty-dollar acceptance fee for every contract it financed, but waived the fee if the dealer sold a membership to a club owned by the finance company.²⁴¹ The actual value of this membership was ten dollars, but the dealer charged consumers sixty dollars,

236. *Id.* at 709–10.

237. *Id.*

238. *Id.*

239. *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 709–10 (11th Cir. 1998). This decision has been questioned by commentators. See NAT'L CONSUMER LAW CTR., *supra* note 232, § 7.3.2.2, at 451 ("The court stated erroneously that it could not 'resort to evidence or documents extraneous to the disclosure statement,' without mentioning the statutory mandate that it consider the 'other documents assigned.' "); Griffith, *supra* note 5, at 315 ("The court in *Ellis* may have confused matters somewhat by referring to Taylor's limiting the inquiry to defects that can be gleaned from 'the face of the documents themselves.' It is unclear, therefore, whether the court's lack of interest in 'documents extraneous to the disclosure statement' can be reconciled with its reference to Taylor, especially when the plaintiffs supported the relevance of the related loan documents in determining the apparent violation.").

240. See *Ellis*, 160 F.3d at 709.

241. *Balderos v. City Chevrolet*, 214 F.3d 849, 852 (7th Cir. 2000).

rolling the acceptance fee into the transaction without disclosing it to the buyer.²⁴² The consumer alleged that the extra fifty-dollar cost of the membership was a hidden finance charge in violation of TILA.²⁴³ He also argued that the finance company was liable because it was apparent on the face of the contract that the sixty-dollar membership fee, which it knew to be far in excess of the ten-dollar cost, was an undisclosed finance charge.²⁴⁴ The U.S. Court of Appeals for the Seventh Circuit held that something “apparent” only by virtue of special knowledge is not apparent on the face of the contract itself.²⁴⁵ The court found that despite its special knowledge, the finance company could not tell by looking at the contract that its acceptance fee had been passed to the consumer.²⁴⁶

Consumers have also argued that when the dealer and the assignee are under common ownership and control, the assignee should be liable because of this special relationship. In *Furge v. Evergreen Finance Co.*, the consumer argued that because the assignee and the dealer were under common ownership and control, the TILA violation was “apparent.”²⁴⁷ The court held that “nothing in TILA . . . indicates that allegations of actual knowledge based on common ownership supports assignee liability under the TILA.”²⁴⁸ The holdings in *Balderos* and *Furge* demonstrate that courts decline to find assignee liability even where the assignees have special knowledge of the violation.

e. Assignee’s Actual Knowledge

Finally, consumers have attempted to convince courts that assignee liability should attach where a consumer can prove that an assignee had actual knowledge of a TILA violation. The facts in *Ramadan v. Chase Manhattan Corp.*²⁴⁹ are similar to those in *Ellis*. As in *Ellis*, the dealer in *Ramadan* inflated the cost of the warranty in the contract

242. *Id.*

243. *Id.*

244. *Id.* at 853.

245. *Id.*

246. *Id.*

247. *Furge v. Evergreen Fin. Co.*, No. 97-C5176, 1998 WL 729624 (N.D. Ill. Oct. 16, 1998).

248. *Id.* at *2.

249. *Ramadan v. Chase Manhattan Corp.*, 229 F.3d 194 (3rd Cir. 2000).

and immediately assigned the contract, and the assignee paid the true/lower cost of the warranty to the mechanic, revealing to the assignee the hidden finance charge.²⁵⁰ Ramadan attempted to draw a distinction between constructive knowledge, which she contended would be insufficient to support assignee liability, and actual knowledge, which she asserted was sufficient.²⁵¹ The court held that there was no support for such a differentiation.²⁵² The U.S. Court of Appeals for the Third Circuit reasoned that Congress's removal of the "without knowledge" language from the assignee liability provision in TILA demonstrated Congress's intent for actual knowledge to be independent of that which could be discerned from the disclosure statement.²⁵³ Based on this reasoning, actual knowledge obtained from sources other than the disclosure statement is insufficient to trigger assignee liability.

2. *Courts' Reluctance to Find Liability Where There is Knowledge of the Violation Is Contrary to the Purpose of TILA*

Failure to impose assignee liability where there is knowledge of the violation diminishes TILA's purpose. Courts fail to impose assignee liability where consumers have shown that assignees have knowledge of TILA violations through the creditors' business practices, public documents, documents assigned in the transaction, a special relationship with a creditor, and even where there is actual knowledge.²⁵⁴ The courts' reluctance to find liability where the assignee's knowledge is relevant impedes its enforcement of TILA because finance companies are able to facilitate creditor compliance with TILA.

In the cases where courts found that knowledge is insufficient to establish liability, the courts' reasoning is based on Congress's rationale for limiting assignee liability. This rationale—that an assignee should not be liable where it can neither detect nor control the violation and that an assignee does not have a duty to look beyond the

250. *Id.* at 196.

251. *Id.* at 199.

252. *Id.*

253. *Id.*

254. *See supra* Part IV.B.1.

disclosure²⁵⁵—does not make sense where an assignee has knowledge of the violation.²⁵⁶ Where knowledge of a TILA violation already exists, there is no further duty of inquiry, and the assignee has control over its liability for TILA violations since it can simply decide not take contracts that it knows contain TILA violations.²⁵⁷

Moreover, where an assignee has actual knowledge of a TILA violation, he is in a position to promote the purposes of TILA by requiring its enforcement. “Through their financing function, assignees are thus in a position to insist that credit sellers or lenders ‘clean up their act’ and maintain proper disclosure systems.”²⁵⁸ Thus, this rationale—which is the reason assignees are liable when a violation is apparent on the face of the document—also applies when an assignee has actual knowledge.²⁵⁹ If an assignee refuses to contract with a seller whom it knows has committed an actual violation, the assignee would enforce TILA’s purpose by requiring the correct disclosures. On the other hand, if an assignee has knowledge and is not liable, TILA’s goals are negated.²⁶⁰

This analysis—that liability for assignees who have actual knowledge enforces the purposes of TILA—can also be extended to encompass constructive knowledge. The creation of a duty of inquiry on the part of the assignee would further enhance the objectives of TILA. An assignee who faces liability because it had, or easily could have had, acquired knowledge of a violation from public records and failed to insist that the creditor comply with TILA is in a better

255. ROHNER & MILLER, *supra* note 2, ¶ 12.06, at 854.

256. Griffith, *supra* note 5, at 317. (“A knowledgeable assignee would have no cause to inquire about the possibility of a breach because he would already be informed about the violation. The Act pretends to limit this liability to assignees who have to seek information from the assigned documents and excuses the assignee who can learn nothing from the face of those documents. If the assignee’s knowledge of the facts does not require this assignee to go further in search of truth, then it should be irrelevant whether the violation is apparent.”).

257. *See id.*

258. ROHNER & MILLER, *supra* note 2, ¶ 12.06, at 854.

259. *Id.* (“[I]t is clearly intended that assignees share with original creditors the responsibility to see that TIL disclosures were properly made.”).

260. Griffith, *supra* note 5, at 352 (“[O]ne may wonder about the utility of protecting an assignee who knows about a violation on the disclosure statement. In that event, the ‘apparentness’ criterion lacks vitality, and there is nothing that promotes the objectives of Truth in Lending by allowing the assignee to hide behind the statutory defense.”).

position than a consumer to promote compliance. Finance companies engage in repeat transactions, enabling them to identify TILA violations with relative ease. By contrast, consumers lack sophistication in credit markets and are therefore less familiar with TILA's requirements.²⁶¹ Expansion of assignee liability could further the goals of TILA by requiring that financiers be familiar with the practices of the industry and holding them liable for violations of which they knew or should have known.

C. The Holder Rule's Effect on Assignee Liability

Where a consumer contract includes the Holder Notice, the question arises whether the Holder Rule subjects assignees to TILA liability regardless of whether or not the violation is apparent.²⁶² Because the Holder Rule requires credit sellers to include a clause stating that the assignee is subject to all claims which the debtor could assert against the original creditor, it is unclear whether TILA's assignee liability provision should trump the Holder Notice.²⁶³ Some courts have found as a matter of contract law that consumer claims and defenses are preserved between the parties.²⁶⁴ However, the majority of courts have held that an FTC regulation cannot overrule a federal statute.²⁶⁵ These courts reason that TILA's assignee liability is explicit and that TILA thus displaces any contradictory agency rule.²⁶⁶ Experts have similarly disagreed on this point.²⁶⁷

1. Most Courts Find the Holder Rule Is Abrogated

Most courts hold that TILA abrogates the Holder Notice.

261. See *supra* text accompanying notes 72–78.

262. ROHNER & MILLER, *supra* note 2, ¶ 12.06, at 859.

263. See, e.g., Ramadan v. Chase Manhattan Corp., 229 F.3d 194, 200 (3rd Cir. 2000).

264. ROHNER & MILLER, *supra* note 2, ¶ 12.06, at 859.

265. *Id.* at 860.

266. *Id.* at 859–60.

267. Peterson, *supra* note 57, at 2241 n.339 (suggesting a comparison between NAT'L CONSUMER LAW CTR., *supra* note 232, § 7.3.10, at 455 n.201 ("[I]t seems likely that 'all claims and defenses' in the Rule means 'all,' not 'all except Truth in Lending . . .'") and ROHNER & MILLER, *supra* note 2, ¶ 12.06, at 859–60 ("Congress wrote the current version of section 131 of the TIL Act aware of the existence of the FTC rule, yet expressly limited assignee liability to facial violation. This must be taken as clear congressional intent to restrict the assignee's exposure to those violations described in the statute.")).

The U.S. Court of Appeals for the Seventh Circuit found in *Taylor* that the Holder Notice was included in the contract because of agency regulation (the Holder Rule) and was not the subject of bargaining between the parties.²⁶⁸ Therefore, the court reasoned that the Holder Notice must be read in light of other laws—including TILA—which impose narrower liability for an assignee than does the Holder Rule.²⁶⁹ Despite the abrogation of the Holder Rule in this context, the court reasoned that the Holder Notice continues to fill a valuable role by reiterating the right of buyers to withhold payment from assignees for claims other than TILA.²⁷⁰ Ultimately, *Taylor* held that the language required by the FTC could not override the express language of TILA.²⁷¹

Further, courts continue to hold that TILA abrogates the Holder Notice even where consumers argue that the only way to give meaning to the inclusion of the Holder Notice in the contract is to find that the assignee intentionally included the notice. In *Ellis*, the consumer conceded that a regulation cannot trump the plain language of a statute, but argued that the only way to give meaning to the Holder Notice in the contract was to accept that by the inclusion of the Holder Notice, the finance company contracted to assume greater liability than the law requires.²⁷² However, the U.S. Court of Appeals for the Eleventh Circuit concluded that no evidence showed the finance company's intent to relinquish TILA's protections because the FTC mandates that the Holder Notice be inserted into every consumer credit contract.²⁷³ Therefore, since the Holder Notice is part of the contract by force of law rather than by the intent of the parties, it must be read in light of other laws that modify its reach.²⁷⁴

Courts find that TILA abrogates the Holder Notice even where consumers argue that to escape liability, assignees should include a disclaimer of the Holder Notice. In *Ramadan*, the consumers claimed that the Holder Notice was not a truly involuntary inclusion in the contract because

268. *Taylor v. Quality Hyundai, Inc.*, 150 F.3d 689, 693 (7th Cir. 1998).

269. *Id.*

270. *Id.*

271. *Id.*

272. *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 709 (11th Cir. 1998).

273. *Id.*

274. *Id.*

Hyundai, the assignee, could have carved out an exception to TILA liability in the Holder Notice by inserting a clause in the contract stating that despite the Holder Notice, the assignee did not intend to be subject to TILA claims.²⁷⁵ Ramadan, the consumer, thus claimed that because Hyundai chose not to "carve out an exception," Hyundai intended to be subject to *all* claims, including TILA.²⁷⁶ Furthermore, Ramadan argued that there was no justification for looking beyond the plain language of the contract to the regulatory history surrounding the Holder Notice's inclusion, which showed that the inclusion was mandated by law.²⁷⁷ According to Ramadan, the financier "cannot now win relief from the specific language of its own contract simply because it claims not to have meant what it said."²⁷⁸

The U.S. Court of Appeals for the Third Circuit disagreed with this argument, stating that the inclusion of the Holder Rule did not contemplate deviations or modifications of the Holder Notice.²⁷⁹ Moreover, the court found that because there is an "irreconcilable conflict" between the Holder Notice and TILA's assignee liability, the court must look at the regulatory background regarding the inclusion of the Holder Notice, which shows that the inclusion was mandated by the FTC regulation.²⁸⁰

2. *Other Courts Do Not Find the FTC Holder Rule Abrogated*

A few courts find that TILA does not abrogate the Holder Notice. In *Cox v. First National Bank of Cincinnati*, the court held an assignee liable for a TILA violation.²⁸¹ The court found the assignee liable not because the violation was apparent on the face of the contract, but because the claim against the seller was valid by virtue of the Holder Rule's

275. *Ramadan v. Chase Manhattan Corp.*, 229 F.3d 194, 200-01 (3rd Cir. 2000).

276. *Id.*

277. *Id.* at 202.

278. *Id.* (quoting *Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d 729, 734 (3d Cir. 1989)).

279. *Id.* at 201.

280. *Id.* at 202.

281. *Cox v. First Nat'l Bank of Cincinnati*, 633 F. Supp. 236, 239 (S.D. Ohio 1986).

claim preservation provision in the contract.²⁸²

Similarly, the court in *Perry* found the claim preservation clause sufficient to create assignee liability.²⁸³ Although the court found that the violation was apparent on the face of the contract, it alternately found that where “the TILA violation alleged herein is a valid claim against Home Video, the seller, it is also a valid claim against HRSI, the assignee, by virtue of the claim preservation provision in the contract.”²⁸⁴

The dissenting judge in the *Ramadan* case also reasoned that the Holder Notice was not abrogated.²⁸⁵ This judge disagreed with the majority, claiming that the inclusion of the Holder Notice justified assignee liability.²⁸⁶ The dissent took issue with the majority’s logic—since the law mandates its inclusion, the Holder Notice was coerced; and since the Holder Notice is in “irreconcilable conflict” with TILA and regulations cannot trump statutory mandates, the Holder Notice must give way.²⁸⁷ Although the dissent conceded that the majority’s argument had “unquestionably a straightforward simplicity which ma[de] it quite compelling,”²⁸⁸ it found that the analysis effectively ignored the interests of the consumers, to whom the Holder Notice is addressed, and instead only considered the interests of

282. *Id.*

283. *Perry v. Household Retail Servs., Inc.*, 953 F. Supp. 1370, 1376 (M.D. Ala. 1996).

284. *Id.*

285. *Ramadan v. Chase Manhattan Corp.*, 229 F.3d 194, 203 (3rd Cir. 2000) (Pollak, J., dissenting).

286. *Id.*

287. *Id.* (“As I understand the court’s opinion, its determination that the Holder Notice is nugatory is the product of the following syllogism: (1) The Holder Notice appeared in Ms. Ramadan’s finance agreement (and, one must suppose, hundreds of thousands of other finance agreements) not as a provision voluntarily acquiesced in by the seller and the assignee finance company, but in compliance with a regulation of the Federal Trade Commission making it ‘an unfair and deceptive trade act or practice . . . for a seller, directly or indirectly, to . . . [t]ake or receive a consumer credit contract which fails to contain the [Holder Notice] provision . . .’ (2) In determining the scope of civil liability for violations of the TILA, Congress has limited the liability of an assignee of a finance agreement to violations ‘apparent on the face of the disclosure statement, except where the assignment was involuntary.’ (3) Since the Holder Notice’s inclusion in the Ramadan finance agreement was, in the court’s view, coerced by the FTC; and the since the Holder Notice, as prescribed by the FTC regulation, is in the court’s view, in ‘irreconcilable conflict’ with the TILA; and since ‘regulations cannot trump statutory mandates,’ the Holder Notice must give way.”) (citations omitted).

288. *Id.*

Congress, the FTC, and the assignees.²⁸⁹ The dissenting judge reasoned that the problem with not considering the consumer is that "it is the Ramadans of the world to whom the Holder Notice is addressed. It is the Ramadans of the world who can be taken to have relied on what the Hyundais of the world have, by accepting the assignment of finance agreements, said to them."²⁹⁰ Although Congress may have meant to abrogate the Holder Rule, finance companies that continue to accept agreements that include the Holder Notice should be held to that representation.²⁹¹ Because consumers are not aware of the interplay between the Holder Notice and TILA, and finance companies are,²⁹² the dissent found that "an assignee finance company that failed to insist on inclusion of an appropriate warning adjacent to the Holder Notice should be estopped from invoking the Holder Notice in litigation."²⁹³ The dissent concluded that by requiring this sort of warning, the reasonable expectations of consumers would not be frustrated.²⁹⁴

3. *Finding the Holder Rule Abrogated Frustrates Consumer Expectation*

Although the majority of courts hold that TILA completely abrogates the Holder Rule, this limitation on assignee liability frustrates consumer expectation.²⁹⁵ Where

289. *Id.*

290. *Id.*

291. *Ramadan v. Chase Manhattan Corp.*, 229 F.3d 194, 204 (3rd Cir. 2000) (Pollak, J., dissenting).

292. *Id.* ("A finance company has no ground for supposing that more than one in tens of thousands of purchaser-borrowers (the Ramadans of the world) will be conversant with the interplay between the FTC regulation and TILA.").

293. *Id.* ("I will not argue (although I think the argument could plausibly be made) that by now the Holder Notices that remain in place are there because finance companies, well aware that Congress in 1980 relieved them of any administratively mandated liability, have decided to accept liability as a contractual matter. To the contrary, I am prepared to accept, arguendo, that the Holder Notice remains an un-bargained for ingredient of the standard finance agreement. But it seems to me that a finance company, feeling that the Holder Notice is in place via *force majeure* and intending to defend against its applicability in any litigation that may arise, should, before accepting assignment of a finance agreement, insist that the Holder Notice be garlanded with *caveat emptors* that warn the purchaser-borrower of the finance company's view that the 1980 TILA amendment robs the Holder Notice of substantive effect.").

294. *Id.*

295. See Peterson, *supra* note 57, at 2241.

courts find that the Holder Rule is abrogated, they reason that the Holder Notice is only included in consumer contracts because the FTC requires its inclusion.²⁹⁶ However, it is uncontested that parties may contract to expand liability.²⁹⁷ As suggested in the *Ramadan* dissent, what these opinions do not address is the effect of the Holder Notice's inclusion on the expectations of the consumer.²⁹⁸ When courts find that the protections afforded by the Holder Rule still apply, they do so because of their concern regarding consumer expectations.²⁹⁹ With the current state of the law, there is no way for consumers to know whether the Holder Notice has been included because of an assignee's intent to expand liability or only because the Holder Rule requires it.³⁰⁰ Thus, TILA's limitation on assignee liability and its interaction with the Holder Rule has created a conundrum for courts.

V. PROPOSAL

In light of TILA's goals to enable consumers to shop for the best credit, to protect consumers against unfair billing, and to police the credit market, Congress should amend the Truth in Lending Act to expand assignee liability. Assignees should be liable for all TILA violations, not just those apparent on the face of the contract. This expanded liability would be similar to the liability created by the Holder Rule and HOEPA. However, the expanded provision should also allow for an affirmative defense. The assignee could escape liability, as it can in HOEPA, if it proves that a reasonable person exercising due diligence could not have determined that a TILA violation existed based on the disclosure statement, documents assigned, a special relationship with the assignee, public documents, or business practices. Furthermore, in light of the conflict between the statement of the Holder Notice and TILA's assignee liability provision, an assignee must demonstrate that it has inserted a provision

296. See *Ramadan*, 229 F.3d at 200–01.

297. See *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 709 (11th Cir. 1998).

298. See *Ramadan*, 229 F.3d at 203–04 (Pollak, J., dissenting).

299. See *id.* at 204; *Perry v. Household Retail Servs., Inc.*, 953 F. Supp. 1370, 1376 (M.D. Ala. 1996); *Cox v. First Nat'l Bank of Cincinnati*, 633 F. Supp. 236, 239 (S.D. Ohio 1986).

300. See *Ramadan*, 229 F.3d at 204 (Pollak, J., dissenting).

adjacent to the Holder Notice warning consumers that the assignee is not liable for TILA violations absent actual or constructive knowledge in order to escape liability through the affirmative defense. This expansion of liability would resolve the problems created by TILA's narrow definition of "creditor," the limited scope of assignee liability, and the interaction of TILA with the Holder Notice.

A. The Definition of Creditor Would No Longer Allow Assignees That Participate in Creating TILA Violations to Escape Liability

With expanded assignee liability, an assignee who is intricately involved in the original transaction and participated in creating the TILA violation could no longer escape liability. The assignee would be unable to escape liability not because TILA would classify it as an original creditor, but because the expanded assignee liability provision creates liability for those assignees that know of and participate in creating the violation.

Yet without a change in the definition of creditor, the current definition would still be somewhat absurd because it would continue to classify a dealer as the original creditor although all it did was arrange for the immediate assignment of the contract. However, the Supreme Court's logic in *Cenance* could be followed, rather than swept aside, because those assignees that act more like original creditors would be treated as such and would not be able to escape liability. Hence form would no longer be elevated over substance simply because Congress changed the definition of creditor.

B. TILA Would No Longer Allow Assignees with Knowledge of the Violation to Escape Liability

An expanded assignee liability provision would create liability when the assignee has actual knowledge or even constructive knowledge—gained through either the business practices within an industry, publicly available documents, a special relationship with the creditor, or the documents assigned in the transaction. Although Congress and the courts expressed concern for limiting assignee liability where he can neither detect nor control the violation,³⁰¹ there is a

301. See ROHNER & MILLER, *supra* note 2, ¶ 12.06, at 854.

strong argument that the positive gains from a stronger enforcement of TILA's policy goals outweighs the cost of imposing an affirmative duty of inquiry on assignees. First, where an assignee has actual knowledge of a violation, no duty of inquiry is created and an assignee already has the option to decline the assignment.

Further, imposing an affirmative duty of inquiry on assignees when knowledge of a violation is available through familiarity with the business practices of an industry, publicly available documents, the activities of creditors with whom the assignee has an especially close relationship, and the documents assigned in the transaction is minimally burdensome. Because assignees make repeated transactions within the market, they are likely already aware of the business practices of creditors within the industry and with the related publicly available documents, like a license fee table. For those assignees that have an especially close relationship with the creditor, like in the *Furge* case where the creditor and assignee were under the same ownership and control, the likelihood of actual knowledge of a violation is high and an affirmative duty to inquire would not be a large burden because of the existing closeness of the relationship. Moreover, an affirmative duty to examine the documents assigned in a transaction is also not overly burdensome and is likely already a requirement under existing law.³⁰²

A duty of inquiry on the part of the assignee would assist in accomplishing TILA's goals of disclosure because an assignee who faces liability under an expanded assignee liability provision would insist that creditors comply with TILA. Assignees are in a better position than a consumer to promote this type of compliance, not only because of their greater experience and sophistication in the market, but also

302. TILA currently states that an assignee may be liable for violations apparent on the face of the disclosure statement and other documents assigned. 15 U.S.C. § 1641(a)(1) (2006). The court's refusal in *Ellis* to impose liability where the violation was apparent from other documents seems erroneous. See NAT'L CONSUMER LAW CTR., *supra* note 232, § 7.3.2.2 ("The court stated erroneously that it could not 'resort to evidence or documents extraneous to the disclosure statement,' without mentioning the statutory mandate that it consider the 'other documents assigned.' " (quoting *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 709–10 (11th Cir. 1998))); *supra* note 239. Thus an expansion of assignee liability would make clear to courts that assignees are liable for violations apparent from other documents assigned and would help prevent erroneous decisions like the one in *Ellis*.

because of the leverage they have with the threat to discontinue business with unscrupulous creditors.

Finally, an expanded assignee liability provision could still contain an affirmative defense for assignees who can prove that a reasonable person exercising due diligence could not have determined that a TILA violation existed based on the disclosure statement, documents assigned, a special relationship with the assignee, public documents, or business practices. This affirmative defense addresses those concerns Congress articulated when limiting assignee liability with the Simplification Act. Because of the affirmative defense, assignees would not be liable for violations that they could not become aware of after a reasonable inquiry or for which they could not control. However, by expanding the assignee liability provision to create liability, but allowing for the defense, the burden shifts to the assignee to show its own lack of knowledge. Shifting the burden from the consumer to the assignee is fair because the assignee, rather than the consumer, is the party who will possess the critical facts and evidence as to whether the assignee knew or did not know of the violation.

C. TILA's Interaction with the Holder Notice Would No Longer Frustrate Consumer Expectation

An expanded assignee liability provision coupled with a warning to consumers on TILA's limitations of assignee liability would alleviate the "irreconcilable conflict"—as described by the *Ramadan* majority—between the Holder Notice and TILA. Presently, TILA's assignee liability rule contradicts consumers' expectations of assignee liability because it is in opposition with the statement in the Holder Notice. However, if TILA's assignee liability provision is expanded, assignees will be liable for TILA violations unless the assignee can assert the affirmative defense. Additionally, if the contract contains the Holder Notice, the assignee will be unable to escape liability through the affirmative defense if the assignee did not insert a warning to the consumer adjacent to the Holder Notice. The expansion of assignee liability and the requirement of the warning would ensure that consumer expectations are not frustrated by the interaction between the Holder Rule and TILA.

This part of the proposal—the requirement of a warning

adjacent to the Holder Notice—is informed by the reasoning of the *Ramadan* dissent. As that dissenting opinion illustrates, when the Holder Notice is included in the contract, courts have a mechanism to impose assignee liability even if Congress does not expand assignee liability in TILA. The *Ramadan* dissent is well reasoned and delineates an equally plausible interpretation of the interaction between the Holder Notice and TILA. Thus, if Congress does not choose to expand assignee liability, courts can still promote the purpose of TILA and refuse to frustrate consumer expectation by imposing assignee liability where the Holder Notice is included in the contract without an adjacent warning to the consumer. A court could adopt the reasoning of the *Ramadan* dissent and find that the finance company is estopped from invoking the Holder Notice in litigation because of the disparity of knowledge between the finance company who “will be conversant with the interplay between the FTC regulation and TILA” and the consumer, who typically is not.³⁰³ Another option for a court is to give effect to the Holder Notice because it is a bargained-for ingredient in the contract. As sophisticated players in the market, finance companies are well aware of the interaction of TILA with the Holder Rule. Because of this knowledge—Congress relieved assignees of liability imposed by the Holder Rule by creating narrow assignee liability in TILA—those assignees who continue to insert the Holder Notice into their contracts without an adjacent warning have decided to accept expanded liability as a contractual matter. Thus, even if Congress does not expand assignee liability in TILA itself, courts have another judicial tool to alleviate consumer frustration created by the interaction of the TILA and the Holder Notice.

D. Expanded Assignee Liability Would Promote TILA's Policy and Goals

Expanding assignee liability would promote TILA's goal of requiring meaningful disclosure of the cost of credit. The policy reasons specified by the FTC for promulgating the Holder Rule and by Congress in enacting HOEPA also support expanding assignee liability for TILA violations.

303. See *Ramadan v. Chase Manhattan Corp.*, 229 F.3d 194, 204 (2000) (Pollak, J., dissenting).

Finance companies that continually work within the market are better situated than consumers to recognize violations and to pressure unscrupulous sellers to reform.³⁰⁴ Without assignee liability, the cost of the violation is carried directly by the unlucky buyer.³⁰⁵

Additionally, the success resulting from the expansion of assignee liability through HOEPA demonstrates that expanded assignee liability is the best mechanism for regulating predatory lending practices and thus TILA violations as well.³⁰⁶ Congress did not enact HOEPA until the problem of predatory lending was out of control.³⁰⁷ By expanding assignee liability now, Congress could avoid a catastrophe like the one currently plaguing the sub-prime mortgage market by proactively implementing a solution. Instead of encouraging assignees to look the other way or participate in the violation, expanded liability encourages assignees to police the market. The devastating effects caused by predatory lending now apparent in the sub-prime mortgage market give further support to the expansion of assignee liability.³⁰⁸

The effect of this expansion would not only include the desired policy effects of spreading the cost and policing the market, but would also produce the practical effect of giving a consumer a remedy where the seller has gone bankrupt or absconded. Expanded assignee liability would allow a consumer like Maria Sanchez to recover where the original creditor went bankrupt and the finance company had actual knowledge of the TILA violation.

VI. CONCLUSION

As Maria Sanchez's story and this analysis demonstrate, Truth in Lending violations remain prevalent and continue to have a detrimental effect on consumers. The limited liability that TILA places on assignees not only allows assignees to benefit from violations, but also allows violations to continue ubiquitously. An expansion of liability would further the purpose of TILA and would prevent the disastrous

304. See *supra* text accompanying notes 72–78.

305. See *supra* text accompanying notes 72–78.

306. See Keyfetz, *supra* note 118, at 152.

307. See *id.*

308. See *id.*

consequences of predatory lending like those of the sub-prime mortgage market. The purposes of the Truth in Lending Act and fairness to consumers require that Congress expand assignee liability to put an end to TILA violations and provide the Marias of the world a remedy against assignees who violate TILA's mandate.
